Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 76-1130

LOUIS JAMES DeSALVATORE, a/k/a LOUIS PIZZA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. Misc.

- -

LOUIS JAMES DeSALVATORE, a/k/a LOUIS PIZZA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

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- -

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed Petitioner's conviction in the United States District Court for the Eastern District of New York, rendered October 20, 1976, convicting

Petitioner of Conspiracy to Possess and Distribute Narcotics, in violation of Title 21, Sections 812, 841(A) and 841(b)(1) (A) of the United States Code, and sentenced him to a maximum term of ten years imprisonment and seven years special parole.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1251 (1). The Court of Appeals for the Second Circuit rendered its decision on January 26, 1977 unanimously affirming the conviction, without opinion.

QUESTIONS PRESENTED

1. Whether Petitioner was deprived of due process of law in the Court relying on matters adduced at another trial, to which the Petitioner was not a party in determining Petitioner's sentence.

2. Whether the Petitioner was deprived of due process of law by the Court treating two previous charges against him, which resulted in an acquittal and a dismissal, as if Petitioner had been convicted or involved in these crimes.

3. Whether the prosecutor broke his promise not to take a position on sentence by giving

damaging information to the probation authorities and by responding to the Petitioner's pre-sentence memorandum, which itself was in response to the official probation report. Is the furnishing of information used to the detriment of the defendant on sentence by a prosecutor to the probation authorities an indirect violation of Santobello v. New York, 404 U.S. 257.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution.

STATUTE

21 U.S.C. Section 841 Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance ...

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of

him for an offense punishable under this paragraph or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

FACTS

A probation report was prepared with respect to the sentence to be imposed upon the Petitioner, and Petitioner and his counsel had an opportunity to, and did actually, examine that report a few days prior to sentence. In fact, certain objections were taken to the report and a formal pre-sentence memorandum was prepared by Petitioner's counsel and submitted to the Court prior to sentence (32A-39A)*. The essential issues that were argued at the time of the actual sentence involved the Petitioner's role in the alleged narcotics conspiracy and other matters. The difficulty came about when it became apparent that the Court

*References are to Appendix in the Court of Appeals.

had acquired a good deal of knowledge due to the fact that between the time Petitioner took his plea and the time he came on for sentence, the other two defendants had actually gone to trial before the same Judge. The Court therefore heard Petitioner's counsel argue that it was natural for the other two defendants to characterize this Petitioner as being the main culprit in the scheme, and the argument was made to the sentencing Court that it had made certain statements based upon a false impression of defendant's role created by the other two defendants in the other trial, rather than on the facts as they were known to be.

At the inception of the sentence proceedings it became apparent that the Court and the United States Attorney had received the presentence memorandum (9A). At the outset, Petitioner's attorney pointed out to the Court that Petitioner had taken a plea of guilty rather than having been convicted by a jury, but the Court said that it had spent three weeks on trial in connection with this case. One defendant was found guilty and one was found not guilty. The

person found guilty was ultimately given a six months sentence. The Court heard the case and had no doubt, consistent with the plea, as to the guilt of Petitioner (11A). Counsel pointed out the fact that he had pleaded guilty, which probably in some way altered testimony that was presented in the other case, since both defense counsel tried to throw all the weight on to Petitioner because he was not there (12A). It was argued that one of the reasons Petitioner pleaded guilty was because of his attorney's advice, although he did not attempt to disclaim his guilt with regard to the count he pleaded to (12A-13A). The point of the argument, and it was made again by counsel, was that Petitioner's participation had been exaggerated by counsel in an attempt to get their clients off, and that what the Court heard was a distorted view of Petitioner's role in this case (13A-14A). The attorney protested that Petitioner was not the main supplier, was not the main cog in the wheel, but that he was just a go-between between the buyer and seller at the insistence of the government (14A-15A).

Petitioner was involved and deserved to be punished, but he was not the main character in the scheme as the other two defendants tried to demonstrate in the other trial. The attorney pointed out, as was reflected in the pre-sentence memorandum, that the Petitioner worked in a bar and ran several ice cream trucks which his son operated; the point being that his sources of income were known and above-board rather than hidden and the result of narcotics dealings. The attorney also pointed out that the probation report was in many ways inaccurate, and although the Court said it would accept the attorney's statement, the United States Attorney, contrary to his agreement with counsel, began to address himself to the facts and made statements which may have played a significant role in determining the sentence of the Petitioner (18A). In fact, MR. PREMINGER, Petitioner's counsel, clearly said that it was his understanding that the United States Attorney would take no position on the sentence (18A). Yet, the United States Attorney, obviously just to rebut the statements made in Petitioner's pre-sentence report, made a state-

ment which was definitely damaging to the Petitioner. The United States Attorney, in arguing whether the Petitioner owned other assets, called the Court's attention to an exhibit, namely a tape, which had been introduced in the other trial, which was a conversation between Petitioner and a government informant. This conversation related to the punchase of a hot kilo of heroin, and Petitioner apparently told the informant that his meat market was doing okay. This was referred to to show that he had some ownership interest in the meat market, a factor which is not illegal in any event, but at the same time illustrates that a conversation regarding heroin had taken place (20A). The Petitioner's attorney cleared that up by saying that the Petitioner had bought a meat market with someone else because the attorney had actually represented the two men at the closing, but that the store did not do business and it was thereafter closed (20A-21A). The United States Attorney, in an attempt to show that Petitioner really owned the

bar that he worked at, again referred to the transcript of the tape at the point where the Petitioner was asked about the bar business, and while Petitioner did not say he owned the bar, he indicated the payroll was killing him (21A). At another point in the conversation, Petitioner apparently referred toa bar and said he used to own that place, and the United States Attorney pointed out that they had sixteen tapes in evidence in which Petitioner allegedly spoke to the informant about the purchase of narcotics (22A).

Counsel objected to the reference to any tapes that he had not had a right to cross examine on, and then the Court said if Petitioner had been on tril, then counsel would have had that opportunity (22A). Apparently it was clear that the Court was holding these things against Petitioner and seemed to berating him for pleading guilty and saving the government the expense of a long trial. Counsel again argued that by the act of pleading guilty Petitioner had removed himself from the proceedings, and to thereafter

use the evidence of the proceedings against him was unfair (23A). The Court said that it would sentence him on what he pleaded to, and not the other things, but then the Court advised that after hearing the evidence at the trial, the Court was fully convinced as to his guilt (23A). The attorney again pointed out that there are many reasons why a defendant pleads guilty, but while Court said it would nothold his failure to go to trial gainst him, it was obvious that the Court's determination of Petitioner's role in this case was based upon the other trial.

The United States Attorney made further references to the transcript of the tape wherein petitioner apparently said that he gave up $350,000.00 himself in a conversation in which the United States Attorney alleged they were talking about dope, and that he apparently made $24,000.00 on another narcotics deal with the same informant (24A)

The attorney again objected that the United States Attorney was violating his agreement that he would take no position at the time

of sentence, and that he was trying to establish from the testimony of the other trial that Petitioner was a serious participant in the narcotics business (25A). In the Court of Appeals, the government conceded that such a promise to take no position had been made. The United States Attorney again referred to the transcript to discuss another narcotics transaction, and then the Court discussed the other case. The Judge said that he had spent over three weeks in the other trial, and that the Court was convinced that Petitioner was implicated and played a leading role in that situation (27A). The Court also took note of the fact that Petitioner had been involved in previous narcotics crimes, once in the Eastern District of New York and once in Canada, and that the Petitioner should have been warned to thereafter refrain from dealing in drugs (27A).

That statement was particularly harmful because the fact of the matter was, as counsel pointed out and as the pre-sentence memorandum showed, the case against the Petitioner in Canada was dismissed and no indict-

ment was ever handed down, and the case in the Eastern District of New York resulted in an acquittal by the jury (27A-29A). The Court then reiterated its conviction that Petitioner was guilty and sentenced him to a term of imprisonment of ten years plus a special parole of seven years (29A-30A).

The attorney again objected that the Court was considering all the things the United States Attorney agreed not to bring into the case, and that Petitioner was being sentenced based upon evidence in a trial in which Petitioner was not a participant. The attorney pointed out that Petitioner took the plea in good faith and it was unfair to thereafter be confronted with evidence he was not able to cross examine on (30A).

The Court again made reference to the Petitioner's prior history, and when the attorney objected that there was no prior history because Petitioner had not been convicted of a crime, the Court said while it was not a record, it should have been a warning to him to get out of the narcotics business (30A-31A). The

attorney again pointed out that the Court was saying he was in the drug business although he was not found guilty, but the sentence imposed was not disturbed.

REASON FOR GRANTING THE WRIT

POINT I

PETITIONER WAS DEPRIVED OF DUE PROCESS WITH REGARD TO HIS SENTENCING BECAUSE THE COURT RELIED UPON MATTERS NOT PREVIOUSLY BEFORE IT, MATTERS WHICH WERE EXTRINSIC TO THE SENTENCE PROCEEDING AND MATTERS WHICH WERE NOT ACCURATE. THE PROSECUTOR ALSO CONTRIBUTED TO THE UNFAIR ATMOSPHERE AND VIOLATED HIS PROMISE TO TAKE NO POSITION ON SENTENCE.

The Petitioner is fully aware of the decision of the Court of Appeals in United States v. Stein, ___F2d (Docket No. 76-1299 decided October 22, 1976).

In the light of that decision, one can imagine that a flood of appeals may ensue in which appellants attempt to litigate the length of sentence imposed on them by District Judges. We believe that this case represents a proper issue for this Court because we fully recognize that the Stein case and the authorities referred to therein made it clear that matters dealing

with excessive sentences are pretty much foreclosed from being reviewed. While we do believe that the sentence in this case was excessive, we did not urge the Court of Appeals to modify the same on that basis, bur rather as was the case in Stein, we argued that the Court did not base its determination of the sentence imposed upon Petitioner on proper factors. We believe that to impose such a harsh sentence upon an appellant, as in the case at bar, based upon things which occurred in a collateral case not only is unfair to the extent of depriving him of due process, but it is also not calculated to encourage defendants in the future to plead guilty and save the government the time and expense of a trial where by doing so they would be placed in a less advantageous position than had they come to trial.

As was the case in Stein, the case at bar is not one dealing with a limited claim of excess of sentence, as was discussed in United States v. Seijo, ____F2d ____(2nd Cir. June 24, 1976) and Dorzynski v. United States, 418 U.S. 424

(1974). On the other hand, this case is similar to Stein, and similar to United States v. Robin, ___F2d ___(2nd Cir. October 15, 1976), as well as United States v. Malcolm, 432 F.2d 809,815 (2nd Cir. 1970), where the Court misapplied or misconstrued material matters of fact and where the Court relied on things not previously before it to the prejudice of the defendant. Thus, in Malcolm where sentence was vacated because the Court had proceeded under a misapprehension of defendant's criminal record, here, too, Petitioner's constitutional rights were violated because even though he had been acquitted by a jury of his peers, the Court obviously treated the Petitioner as if he had been a convicted felon in that narcotic case. On two occasions the Petitioner, thus, had been charged with narcotic violations. One resulted in an acquittal in the Eastern District of New York and the other in a dismissal in a foreign country in which other defendants were thereafter indicted but the Petitioner was not charged at all. The Court repeatedly made the

statement that these cases should have been a warning to Petitioner (30A-31A), which statements played a significant part in the sentence meted out. It is most respectfully urged that a Court is absolutely bound by the Constitution to give no weight whatsoever to a conviction or dismissal and must refrain from making statements such as were made in this case, where the Court used these prior events to the detriment of Petitioner in imposing sentence.

In addition, there were repeated references to tape recordings which were introduced at the other trial, to which Petitioner was not a party, and these recordings were so significant that the Courtmade no attempt to hide its feelings that based upon what it had heard in the other trial, Petitioner was a major narcotics violator and was the guiding force behind the scheme.

It takes no great imagination to recognize that where there are multiple defendants in a criminal case and one is either severed or pleads guilty, the other

defendants, in order to extradite themselves, may try to falsely show that the missing defendant was really the ringleader or the main character in the scheme. It does not seem to be basically fair to accept evidence introduced in such a proceeding where the Petitioner was not a party as conclusive proof of the facts sought to be proven. When one reads all of the sentence minutes in this case, the impression is indisputable that the Court considered the Petitioner to be the major character in this scheme, and that the Court's conclusions were solely based on the evidence it had heard in the three week period of the other trial. The Constitution guarantees the right of Petitioner to cross examine and to defend himself if he particpated in that other trial, and certainly the Petitioner would have been in no worse a position had he refused to plead guilty and gone to trial in that case.

Part of our judicial system is based upon the idea of rehabilitating criminals. One of the first steps is to have the defendant admit his guilt, verbalize his remorse and embark upon the necessary steps towards rehabilitation. It has always been recognized that when the defendant thus pleads guilty and saves the government the expense of a trial, and that other trial would have been greatly lengthened by Petitioner's participation, he certainly should not suffer for his candidness and forthrightness in admitting his guilt and facing the consequences.

What happened in this case goes against every concept of fairness and is certainly not an inducement to other people similarly situated to admit their crimes and embark upon the road back. If the Court in this case was so influenced by what happened in the other trial, it should have told the Petitioner to take back his plea and go to trial in that matter. Certainly, Petitioner would have been no worse off than he stands

now. He has been falsely accused of being a major dealer in narcotics and has been sentenced when he had no opportunity to defend himself and no opportunity to test the reliability of that evidence. In addition, there had been an agreement at the time of the taking of the plea that the United States Attorney would take no position on sentence. This agreement was mentioned by Petitioner's attorney and was acknowledged by the prosecutor (18A-25A). The United States Attorney was allowed to refer to transcripts of tape recordings made of conversations in which Petitioner was a participant. These recordings were evidently introduced at the other trial and were used to prove to the sentencing Court that Petitioner was involved in a major way in the narcotics conspiracy. Of course, counsel for Petitioner had not heard the recordings. He did not know if there were any exculpatory portions, and he certainly had no right to object to them or cross examine on them,

because he was not a participant in that trial. The government clearly broke its promise in this case to take no position on sentencing, and to make statements in the guise of rebutting the Petitioner's pre-sentence report was improper. After all, the Petitioner's pre-sentence report was in response to inaccuracies and misstatements contained in the probation report, so that by allowing the United States Attorney to make further statements and refer to extrinsic evidence, the government was allowed to pick itself up by its own boots, because it was the government's misstatements that led to the Petitioner's memorandum in the first place. Certainly, all of these improper factors must have unduly influenced the Judge, because Petitioner received a ten year sentence, while the other defendant, who was found guilty by a jury, only got six months.

The promise of the government not to take a position on sentence should have been adhered to, and the breach of that

agreement added to the unfair atmosphere present at the time of the imposition of sentence. Santobello v. New York, 404 U.S. 257; United States v. Palermo, ___F2d ___ (2nd Cir._____).

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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PREMINGER, MEYER & LIGHT
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of January one thousand nine hundred and seventy-seven.

Present: HON. ROBERT P. ANDERSON

HON. JAMES L. OAKES

HON. MURRAY I. GURFEIN

Circuit Judges,

- -

United States of America,
Plaintiff-Appellee

v.

Louis James DeSalvatore, a/k/a Louis Peazza, Anthony Fago, John Giangrande, Defendants — 76-1515

Louis James DeSalvatore, a/k/a Louis Pizza,
Defendant-Appellant.

- -

Appeal from the United States District Court for the Eastern District of New York.

THis cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said Distrcit Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk